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Supreme Court of the United States

October Term, 1959

No. 220

WILLIAM O'DWYER and SLOAN O'DWYER,
Petitioners,

against

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable the Chief Justice of the United States and Associated Justices of the Supreme Court of the United States.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered April 21, 1959, which affirmed a decision of the Tax Court of the United States of November 21, 1957, that had determined deficiencies in the payment of income taxes of petitioners for the years 1949, 1950 and 1951, during which years the petitioners had filed joint returns as husband and wife.

Opinions Below

The opinion of the Court of Appeals for the Fourth Circuit is reported at 266 F. 2d 575 and is printed in the appendix to this petition at pp. 35-56. The opinion of the Tax Court is reported at 28 T. C. 698 and reproduced at page 7a of petitioner's appendix below, copies of which are filed herewith.

Jurisdiction

The jurisdiction of the Court is based on 28 U. S. C. 1254(1). Judgment below was entered April 21, 1959.

Questions Presented

1. Whether a gift made as a political or campaign contribution to a taxpayer running for office may, nevertheless, be taxed as income, on the theory that it is the duty of the taxpayer to furnish proof that it was used for that purpose.

2. Whether the Tax Court's refusal to enforce a taxpayer's subpoena calling for the production of the record on which the determination of the Commissioner of Internal Revenue was based, deprived Petitioners of a fair hearing under the due process clause of the Constitution in view of the "presumption of correctness" asserted by the Commissioner of Internal Revenue, or was inconsistent with the "judicial review" requirement of the Administrative Procedure act.

3. Whether an Internal Revenue officer may reject the determination and finding of a Foreign Service officer that certain expenditures, concededly made by him as Ambassador, were necessary and appropriate to the discharge of the taxpayer's duties as Ambassador and disallow such expenditures as proper deductions from his gross income.

4. Whether the respondent may determine, without evidence, that a mere single, isolated but unexplained, $1500 deposit in a joint account of wife and mother-in-law constituted income to husband and wife, particularly where there was no pattern of questionable deposits.

Principal Statutes Involved

The Revenue Act in force in 1949 (Revenue Act of 1939, 26 U. S. C. 1952 ed. Sec. 22) provided, Section 22:

> "(b) *Exclusion from gross income*—The following items shall not be included in gross income and shall be exempt from taxation under this title. • • •
>
> (3) *Gifts, Bequests and Devises*—The value of property acquired by gift, bequest, devise, or inheritance. • • • "

Section 10 of the Administrative Procedure Act, "Judicial Review of Agency Action", (5 U. S. C. Sec. 1009)

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) *Right of Review*—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) *Form and Venue of Proceedings*—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute . . .

(c) *Acts Reviewable*—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. . . .

(e) *Scope of Review*—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

Statement of the Case

The petitioner, William O'Dwyer has been a Magistrate of the City of New York, a County Judge and District Attorney of Kings County, a General in the United States Army, Minister to Italy, and Chairman of the War Refugee Board, and between 1946 and 1950 was Mayor of New York City. In 1950 he was appointed United States Ambassador to Mexico and served as such until December 5, 1952 (Exh. 9f).

The items or transactions involved herein were:

(1) A campaign contribution alleged to have been made to him during his campaign for the Mayoralty in 1949.

(2) Deductions, as business expenses, of sums conceded by respondent to have been spent by petitioners, during William O'Dwyer's tenure as Ambassador, but unreimbursed by the State Department.

(3) A deposit of $1,500 to a joint New York account in the name of Mrs. O'Dwyer and her mother which the Commissioner claimed as income to William O'Dwyer and his wife.

The facts pertaining to the second and third items were stipulated, except insofar as the respondent declined to submit for examination the record on which he acted in making his adverse determination. The facts with respect to the first item were, briefly, as follows:

The Uniformed Firemen's Association (U.F.A.) was an organization composed of New York City Firemen of which one Crane was President, Purcell its Secretary (73a)* and Dolan, its Treasurer (34a).

Crane ran the organization (84a) and Purcell supervised the collection of proceeds from firemen's balls—a principal source of the organization's revenue (38a-39a).

In and prior to 1949, while running the U.F.A., Crane and Purcell embarked upon an enterprise, under the name

* References are to Petitioners' Appendix below, filed herewith.

of Whitestone Estates, Inc., in which they invested nominal amounts of their own money and admitted using substantial amounts of U.F.A. funds (115a). This company acquired 76 acres of land and built 179 houses (116a). It appeared that some $30,000 had been taken from the U.F.A. treasury in the autumn of 1949 and turned over to Crane without receipt or accounting (51a). Charges and rumors of irregularities having been made as to the handling of the U.F.A. funds, Crane and Purcell came under direct investigation in 1950 and 1951 by the New York County District Attorney, and by the Bureau of Internal Revenue. In the course of, or as a result of such investigation, Purcell was convicted of larceny and sent to jail (40a), but Crane's counsel secured an arrangement whereby the District Attorney permitted Crane to testify before the Grand Jury and thereby gain immunity (113a).

In attempting to account for his large withdrawals of U.F.A. funds, Crane testified that, among other expenditures, he made a cash campaign contribution of $10,000 to William O'Dwyer in his 1949 campaign for the Mayoralty of New York City (99a-100a). The Crane story, as first told to the N. Y. County District Attorney, and later to the Kefauver Committee, was that he made a campaign contribution by personally delivering to Mayor O'Dwyer at his official residence an envelope containing $10,000, that no one else was present, and that he knew of no witness to the incident (103a).[1]

The petitioner, William O'Dwyer, who was Ambassador to Mexico at the time of the Kefauver hearings, appeared voluntarily and testified before that Committee, and then

[1] When Crane first appeared before the Kefauver Committee, he declined to talk about his conduct of U.F.A. finances and affairs, pleading the Fifth Amendment (112a), but later he did testify and told the above story. When asked "Were you alone with him" he insisted that he was and that he knew of no witnesses. He repeated this same story to the Bureau of Internal Revenue which had become interested in his tax return (133a).

appeared and testified before the Commissioner. To each he denied, under oath, Crane's story (27a, 29a, Ex. 2).

He also appeared before the Grand Jury, waived immunity and testified fully as to this matter and submitted a net worth statement which substantiated his denial of Crane's story (Ex. 3).

Crane, when pressed to produce corroboration of his story, or face the consequences of disbelief, including a charge of further income tax (139a), turned to his own brother as a possible witness but his brother would have none of it (103a).

Later, an individual named Wilders appeared on the scene for the first time. Wilders was city fireman, a college chum and close friend of Crane (107a, 166a-167a), and helped Crane to buy a car without premium payment, when cars were scarce (159a), and was always willing to go "out of his way" to help Crane (107a). And this was how he came to Crane's assistance, according to their own testimony.

One day in May, 1951, Crane met Wilders in Yonkers and took him for a walk around a Reservoir (114a). In the course of that walk, Wilders spoke of the Gracie Mansion incident and asked Crane whether that occurred on "the day I drove you up there" and reminded Crane that on that particular day he "had an envelope with money in it". Crane thereupon remarked "that's the day", and that he was glad to know that Wilders "was the one that was with him" (172a).

It was not until "some time in 1952" (106a), "8-10-12 months" after the Reservoir walk and talk (135a), that Crane for the first time revised his original story and mentioned Wilders and Finkelstein, the O'Dwyer campaign manager, as having been involved in that trip to Gracie Mansion.

The new story was exposed to scrutiny for the first time at the Tax Court.[2] It was substantially and briefly as follows: Finkelstein, the campaign manager, had solicited a campaign contribution from Crane (87a); on October 10th, 1949, Crane had three things in mind for that day (a) he had to have his car serviced (b) he had to make a trip to the Mayor's mansion, and (c) he had to make a flight to St. Paul to attend a convention. To accomplish these purposes he took with him $10,000 which he received from Dolan about four days prior[3] and drove to Wilders' fire house, where Wilders found him (the two were in conflict as to whether a prior appointment had been made) (158a); that when Crane tried vainly to get a taxicab Wilders offered to "drive him wherever he wanted to" (159a-160a); that Crane accepted the offer and told Wilders to proceed to pick up Finkelstein, and then drive them to the Mayor's mansion; that in front of the mansion a lady was in the Mayor's car whom Finkelstein recognized and with whom he stopped to talk; that the Mayor was on the porch where a valet was helping him on with his coat as he was ready to leave; that he gave the Mayor the envelope with the money and the Mayor, without examining it tossed it to someone and left (94a).

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[2] Wilders and Crane had prepared their testimony for the Tax Court hearing most carefully, Crane testified as to this:

"Q. Have you talked about your testimony and talked it over with Wilders? A. Yes, I have.

Q. And when was that? A. A few minutes ago.

Q. Did you talk about the testimony that you were going to give here? A. We talked about Wilders' participation on this particular incident. Yesterday, the day before, today" (142a).

Wilders, however, denied having spoken with Crane about his testimony *since 1951* (168a).

[3] Dolan testified, however, that he drew for Crane $5,000 on September 26th and $5,000 on October 6th (30a).

The respondent's witnesses before the Tax Court were enmeshed in other contradictions.[4]

Dolan's story of *six* separate withdrawals, of $5,000 each, was consistent, if anything, with a practice by Crane of looting the firemen's funds under guise of expenditures in support of the referendum.[5] Neither he, nor Crane, gave or offered any explanation as to why two $5,000 items were drawn, ten days apart, when a single $10,000 gift was contemplated. And Crane specifically testified that it had never been in his mind to give a $5,000 contribution—that before the money was drawn he had told Dolan "I wanted $10,000" (133a).

References in Crane's direct testimony to the role played by Finkelstein—when contrasted with the thrice-told prior story that Crane was alone, or knew of no witness—were alone sufficient to discredit his story. Crane knew Finkelstein well, and knew him to be Mayor O'Dwyer's campaign manager (87a). He said that Finkelstein was the man who solicited the campaign gift; and that Finkelstein wanted to be present when it was made (88a); that Finkelstein spoke to him after the election about the need for an additional contribution (99a). *Yet Crane never mentioned Finkelstein in his first stories, for over a year.* Finkelstein had denied that such an incident ever took place (131a) and respondent did not call him as a witness.

The Ruling on the Subpoena

Petitioners claimed from the very outset that the Commissioner's determinations were unwarranted by the facts,

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[4] For example, Crane testified that there was never any disagreement between himself and Mayor O'Dwyer as to the referendum on a proposed constitutional Amendment (98a) and thus his contribution in aid of William O'Dwyer's campaign had no relationship to such Amendment. Dolan, on the other hand, testified that the $10,000 was drawn from the firemen's fund under vouchers showing an expenditure in support of that referendum (50a, 65a).

[5] There were four additional withdrawals of $5,000 each, brought out on Dolan's cross-examination, two each on October 14 and October 20, 1949, and all going to Crane (67a-71a).

and also were arbitrary, capricious and inspired by motives having nothing to do with an impartial and fair administration of the revenue laws. At the hearing the Commissioner admitted that determinations of unreported income of $5,000 in 1950 and $15,000 in 1951 were wholly erroneous, without even a particle of rational explanation, except with respect to one $1,500 item represented by a bank deposit to the credit of petitioner Sloan O'Dwyer and her mother (Tr. 7).

To prove the arbitrary character of respondent's determinations, the petitioners subpoenaed the record on which the Commissioner had acted (21a-25a; 28a-33a), but the Commissioner declined to obey the subpoena except for the production only of (a) the transcript of William O'Dwyer's sworn testimony and (b) his financial questionnaire or net worth statement, both relating to 1949.

The Judge of the Tax Court declined to direct compliance with the subpoena (29a) to which exception was duly taken.

At the trial, the petitioners placed in evidence the transcript of Ambassador O'Dwyer's testimony which denied, and financial statement which disproved, receipt of the $10,000 in 1949 (Exs. 2, 3); they also offered a certain documentary proof and evidence which showed that the Commissioner must have had available to him Finkelstein's denial and other evidence negativing his determination of a deficiency. Finkelstein had testified under oath in a judicial proceeding, that such an incident as Crane testified to "never happened" (131a, 145a).

Everyone knows, and Crane admitted knowing (120a) that it is a crime for a candidate occupying an official position such as Mayor O'Dwyer occupied in 1949, to accept or solicit political contributions from Civil Service Employees. (*People* v. *Connolly*, 168 App. Div. 919, 152 N. Y. Supp. 495.) Crane was admittedly a Civil Service employee, in spite of his quibbling on the point (121a). It is just incredible that Mayor O'Dwyer, running for re-

election, would have been so naive as to subject himself to such violation of law, particularly when, according to Crane's story, he could easily have had his campaign manager, then and there present, accept the contribution for him or on behalf of his campaign committee.

Crane's statement about making the campaign contribution to the Mayoralty candidate personally, prompted numerous inquiries by the FBI, by Grand Juries, by a Senate Committee, as well as respondent. No action or proceeding of any character against Mayor O'Dwyer resulted from any of these investigations—except only the Commissioner's arbitrary and baseless determination.

Never, in any reported instance that we have been able to find, has the Government absolved a taxpayer such as Crane from liability for taxes on income traced to his possession, and admittedly received by him, simply on the basis of his unsupported and uncorroborated word that he "gave" the money to another—particularly when the story was contradictory, inconsistent and permeated with an air of fabrication. In this case, the respondent not only absolved Crane, but taxed petitioner solely on Crane's discredited story—which no other agency thought worthy of credence.

Reasons Relied on for Allowance of the Writ

The Court below decided:

(a) that respondent could, in effect, sub-classify political gifts and, without statutory warrant, specify circumstances under which he would treat such a *gift* as *income*, taxable to the donee, and

(b) that even though respondent's determination was entitled to a "presumption of correctness"—for purposes of judicial review—he might withhold from the reviewing court the whole record on which his decision was made.

Each of these propositions, decided in favor of respondent below, involves an important question of federal law, not settled by this court, and decided below in a manner

incompatible with the pertinent legislation, and the past decisions of this and other federal courts.

Not only has the Court below construed incorrectly the substantive and procedural legislation involved; it has raised grave doubts of the constitutionality of that legislation. The Sixteenth Amendment was never intended to permit the taxation of *gifts*—but only *income*. The statutory scheme for review of the Commissioner's determinations is jeopardized by grave due process considerations if it be construed to permit suppression and concealment of the record on which respondent makes decisions that thereafter become adorned with a badge of "presumption of correctness".

This Court, by grant of certiorari on June 1, 1959, in *Kaiser* v. *United States*, 262 F. 2d 367, has given recognition to the necessity for review of the broad claims by the respondent to extend his authority to reclassify gifts as income, or subclassify gifts in such fashion that some will be taxable (No. 858, O. T. 1958).

1.

Even if Crane gave a campaign contribution to petitioner, such gift did not constitute receipt of taxable income.

The Court of Appeals refrained from approving the Tax Court's findings of fact, saying only that it was "not prepared to hold that the findings of fact are clearly erroneous as we are not left with the definite and firm conviction that a mistake has been committed" (p. 48, *infra*).

Passing by the inherent improbabilities of Crane's story, the inquiry still remains as to whether this alleged occurrence involved receipt of taxable income.

The Tax Court found that: "The evidence strongly supports the view that Crane intended the payment as a political or campaign contribution" (R. 13a).

Assuming—without admitting—this conclusion, we have nothing but a "political contribution" or a "campaign contribution", both of which are interchangeable terms for a mere gift.

Merriam's Webster's New International Dictionary (1956) sets forth as the only synonyms for "gift", the words "donation, contribution" (p. 156); and "contribute", is defined "to give or grant in common with others" and "contribution" as "the portion which an individual furnished to the * * * whole which is formed by the gifts of individuals".

The Revenue Act in force in 1949 provided, Section 22:

> "(b) Exclusion from gross income—the following items shall not be included in gross income and shall be exempt from taxation under this title. * * *
>
> (3) Gifts, Bequests and Devises—the value of property acquired by gift, bequest, devise, or inheritance. * * * "

Such exclusion has been contained in the Revenue Acts from their inception, and is continued in Sec. 102(a) of the present Act: "Gross income does not include the value of property acquired by gift. * * * "

The pertinent regulation of the Bureau, Regs. 118, Sec. 39.22(b) (3)-1 likewise states "Gifts and Bequests (a) Property received as a gift * * * is not includible in gross income. * * * "

A serious constitutional question would be presented if the statute were to read or be construed otherwise.

In *Edwards v. Cuba R.R. Co.*, 268 U. S. 628, 633, there was presented the question of the taxability of subsidy payments made to induce the building and operation of a railroad. The Court said:

> "The subsidy payments taxed were not made for services rendered or to be rendered. They were not

> profits or gains from the use or operation of the railroad, and do not constitute income within the meaning of the Sixteenth Amendment".

Compare, *Brown Shoe Co., Inc.* v. *Comm'r*, 339 U. S. 583.

Since a "contribution" means a "gift" in plain language; since the words are synonymous, and since the language of exclusion is clear and unambiguous, it would seem that the inquiry should end there. As was stated in *United States* v. *Merriam*, 263 U. S. 179, 187-188, a case dealing with a similar exclusion from gross income ("bequest"):

> "in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer."

There is certainly nothing in the statute to justify treatment of a gift or a contribution for tax purposes on any different basis merely because of its characterization by the word "political" or "campaign". The Commissioner, in Revenue Ruling I.T. 3276, reported in Cum. Bul. 1939-1, Part I, p. 108, said exactly that:

> "Advice is requested whether (1) contributions to political organizations are allowable deductions in the donor's Federal income tax return, and whether (2) political gifts or donations to individuals or to political organizations are subject to Federal Income Tax.
>
> "With respect to the first inquiry, it is held that contributions to a political organization are not proper deductions in the donor's Federal income tax return, there being no provision in the Revenue Act of 1938 which allows such deductions.
>
> "With respect to the second inquiry, it is held that a political gift received by an individual or by a political organization is not taxable income to the recipient."

Such was the respondent's opinion during the tax year under review, for five years thereafter and which remained as such until purportedly "modified" in 1954—while this very case was pending in the office of the agency which "promulgated" the modification, Rev. Rul. 54-80, 1954-1, Cum. Bull. p. 11.

The substance of the purported modification is to the effect that the statutory exclusion of such gifts from gross income would only be recognized where the gift is used or held for campaign expenses; but that where part or all is "diverted" to the personal use of the candidate it constitutes taxable income.

The respondent, in other words, asserted the authority to classify gifts, and tax them as income, depending on their ultimate use by the donee.

In *Bogardus* v. *C.I.R.*, 302 U. S. 34, 40, however this Court said:

> "If the sum of money under consideration was a gift and not compensation, it is exempt from taxation and *cannot be made taxable by resort to any form of sub-classification.* If it be in fact a gift, that is an end of the matter; and inquiry whether it is a gift of one sort or another is irrelevant. This is necessarily true, for, since gifts are made nontaxable, there can be no such thing under the statute as a taxable gift." (emph. supp.)

Or as stated by Judge Disney in *Bert P. Newton*, 11 T. C. 512, 520:

> "From the *Bogardus* case was derived certain basic considerations: that gift and compensation for personal services are mutually exclusive. * * * "

A donor's motives may not be entirely unselfish. Motives as they relate to political gifts are sometimes complex. It is well known that some will make political contributions to each of the opposing candidates. They are

nonetheless gifts, and not taxable, regardless of motive, if the intention was to make a gift.[6]

In *Helvering* v. *American Dental Co.*, 318 U. S. 322, the Board of Tax Appeals had rejected a claim that gifts were involved because the donors did not act for "altruistic reasons or out of pure generosity". But this court reversed the Tax Court and said, at pages 330-331:

> "With this conclusion we cannot agree. We do not feel bound by the finding of the Board because it reached its conclusions, in our opinion, upon application of erroneous legal standards. Section 22(b)(3) exempts gifts. This does not leave the Tax Court of the United States free to determine at will or upon evidence without judicial review the tests to be applied to the facts to determine whether the result is or is not a gift. The fact that the motives * * * were those of business, or even selfish, if it be true, is not significant."[7]

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[6] The Court below, and the Tax Court, fell into conflict in speculating as to what legislation, if any, the firemen hoped would be enacted when they supported Mayor O'Dwyer—the latter concluding it was salary legislation (9a-10a) and the former feeling it was pension legislation (p. 45, *infra*).

The record is actually barren of proof of any "consideration" of any sort, for the campaign contribution. It was an election year. Crane testified that he *preferred the petitioner over his opponent*, as a candidate for Mayor.

> "When the choice appeared to be that of supporting Mr. O'Dwyer, or Mr. ..... I think the Republican candidate was Mr. Newbold Morris—the fireman got concerned about it, feeling that he had no choice but to support Mr. O'Dwyer" (R. 86a).

The only conversation alleged to have been had at the moment of the "gift" was

> "I told him I had promised him some support. The firemen would support him and I was presenting him with this envelope as evidence of that support" (94a).

[7] A gift may be a business expense and as such a legitimate deduction, e.g., *Peters* v. *Smith*, 221 F. 2d 721. And the very obvious business or selfish motive of the donor did not transform a gift into something else in *Glenn* v. *Bates*, 217 F. 2d 535 (Stewart, J.).

No court, or writer, in describing the criteria of a gift has ever made reference to the later use or disposition of the funds by the donee.* E.g., 1 Mertens, Law of Federal Income Taxation, Sec. 7.12, Ch. 7, p. 22:

> "The most commonly accepted essentials of an inter-vivos gift are: capacity and an intention to make a gift, an irrevocable present transfer of title, dominion and control, delivery and a valid acceptance by the donee."

The principal question is usually one of intention.

> *Willkie* v. *C. I. R.*, 127 F. 2d 953;
> *Brayton* v. *Welch*, 39 F. Supp. 537;
> *Alice M. McFarlane*, 19 T. C. 7;
> *J. Marion Wright*, 30 T. C. 392.

In 1 Mertens, Federal Income Taxation, Sec. 7.10, Ch. 7, p. 17, it is said:

> "As used in the Sixteenth Amendment, the term 'income' is not the equivalent of 'economic income' which term might well include decreases in or additions to one's wealth from any source derived. The Statutes promulgated since the Sixteenth Amendment have in effect drawn this distinction by specifically providing that property acquired by gift, bequest, devise or inheritance is not included in gross income."

Even according to the respondent's peculiar distinction between a contribution expended by the donee for one purpose, or "diverted" for another, the record is not "devoid of evidence" (R. 13a) as to disposition of the gift. The sole testimony is that the political contribution was in fact used as such. Crane testified that after the election, the

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* In *Bail Fund of the Civil Rights Congress*, 26 T. C. 482, the taxpayer received "contributions solicited by the Bail Fund for its general purposes" and the funds were used "to furnish bail for persons held in custody in certain type of cases". With reference to the contributions received, Judge Raum there held:

> "The Commissioner's determination treated these amounts as income to petitioner. We think the Commissioner erred in this respect. The amounts in question were plainly contributions or gifts, and therefore not includible in gross income."

Campaign Manager said "he knew I gave substantial amounts of money and could I possibly give them some more" (99a), a statement incompatible with "diversion" to personal use.

In any event, the respondent has been permitted to adopt an improper and unwarranted technique of attempting to reclassify a gift as income. It is unauthorized by statute, and without basis in precedent. It is unrealistic and without sense or justification; it disregards the fact that often much of a candidate's own resources are expended in campaigning.[9]

There was cited below *Mayson L. Reichert*, 19 T. C. 1027, a case that was affirmed on other grounds, but that case involved a whole setting and practice of payments for services, made in non-campaign years, and the question there presented was stated in the opinion itself as "whether petitioner received income in those years from pay-offs and the like in the guise of political contributions."

The Commissioner has never dared even to suggest that such was the situation here.

The Court below never really came to grips with, or even touched upon, the real issue presented by this case: may the respondent, contrary to *Bogardus* v. *Helvering*, 302 U. S. 32, classify and subdivide types of gifts and rule that some of them are taxable as income and some of them are not?

Instead, the Court below assumed that such inquiry was foreclosed to it by the publication by respondent, in 1954, of Rev. Rul. 54-80. Such "Revenue Rulings", however, do not have the force and effect of Regulations, much less of

[9] Political gifts are apparently considered immune from tax in certain circumstances even when *not* made as campaign contributions. Insofar as we can ascertain from any public record or decided case, respondent never saw fit to treat as taxable income payments, motivated by sympathy with the donee-legislator's politico-economic philosophy, of the kind reported, e.g., in N. Y. Times Sept. 19, 1952, p. 1 ("Nixon Affirms Getting Fund of $16,000.00 from Backers").

law. They have, and are intended to have, not much more weight than a press release. See, e.g. Cum. Bull. 1954, p. 1:

> "Revenue Rulings reported in the Bulletin do not have the force and effect of Treasury Department Regulations" and "each published ruling represents the *conclusion of the Service* as to the application of the law" (italics supplied).

See also, *United States* v. *Bennett*, 186 F. 2d 407, 410 ("these rulings * * * made to order * * * [have] no more binding or legal force than the opinion of any other lawyer") and *Bartels* v. *Birmingham*, 332 U. S. 126, 132.

The reach of the Sixteenth Amendment, and of the statutes enacted pursuant to the authorization it conferred, has never heretofore been construed to extend to *any* type of gift. The Court below has permitted the respondent to exercise a power which would enable him to police all gifts, regardless of character, or source, and tax them as income if he concludes they were not used as the donor wished.

The factors probably moving this Court to grant, on June 1, 1959, *certiorari* to review *Kaiser* v. *United States*, 262 F. 2d 367, are present here, and should not be obscured by the confusion of the Court below in addressing itself to the strawman question as to the retroactivity of the 1954 Revenue "Ruling". Even a Regulation—which the 1954 dictum certainly was not—"can furnish no sustenance to the statute" by "an attempted addition to the statute of something which is not there," *United States* v. *Calamaro*, 354 U. S. at p. 359. A gift is a gift and all the I. T.'s, R. R.'s, O. D.'s and T. D.'s in the world cannot convert a gift into income.

2.

Petitioners were denied due process of law and deprived of a fair hearing when the Tax Court refused to require the Commissioner to produce for review the whole record on which he had acted.

In order to obtain and present evidence that the Commissioner's actions were arbitrary, the appellants sought

to subpoena his entire file so that the Tax Court could have before it for review the "whole record" on which the Commissioner had acted.

It is unthinkable that a determination by the Commissioner, if shown to have been made by the toss of a coin, could stand. Nor could a decision be sustained, if it appeared that such decision were motivated by considerations of political advantage.

It has been long settled that the duty of the Tax Court (and its predecessor, the Board of Tax Appeals) has been to set aside the Commissioner's determination, if arbitrarily made, regardless of whether the taxpayer was able to establish the negative of the factual proposition implicit in the determination of the deficiency.

In *Helvering* v. *Taylor*, 293 U. S. 507, 514, this Court said:

> "The fact that the Commissioner's determination of a deficiency was arbitrarily made may reasonably be deemed sufficient to require the Board to set it aside."

Whether the Commissioner's determination was arbitrary or rested "upon a false foundation" (*Wilson Coal Land Co.*, 87 F. 2d 185, 189) or the result of "mere guess work" (*Fairmount Cemetery Association* v. *Helvering*, 79 F. 2d 163, 165) or with "no foundation for the price figure" (*Andrews* v. *Commissioner*, 135 F. 2d 314, 318 C. D. 320 U. S. 748) or "erroneous conclusions" of the examining Revenue Agents (*Acorn Refining Co.*, 2 BTA 253) or based upon "accounting gymnastics" (*Index Notion Co.*, 3 BTA 90) may, and often does, *appear in the Commissioner's own records.* That is where evidence of arbitrary action is most likely, if not solely, to be found, and that is what the petitioners sought to establish in this case.

In *Blair* v. *Oesterlein Mach. Co.*, 17 F. 2d 663 (mod. oth. grds. 275 U. S. 220) it was said by the Court of Appeals:

> "it is difficult to conceive of any judicial proceeding more intimately dependent upon the evidence records, and data, on which the findings of the Commissioner in tax cases is based, than the proceedings reviewing those decisions on appeal by the Board of Tax Appeals * * *.
>
> "This tribunal [The Board of Appeals] * * * will be presumed to possess the power to call to its aid every agency essential to the full and complete investigation of the issues committed to its jurisdiction. Sustaining, as we must, the power of Congress to call this Board into existence, and to vest it with the broad jurisdiction conferred by the Revenue Act, *it would be a travesty to hold that the evidence upon which that jurisdiction may be intelligently exercised can be withheld by the subordinate officer of the government, whose decisions the Board is specially vested with power to review* * * *.
>
> "The right of appeal here afforded has special reference to the protection of the taxpayer from possible arbitrary, unjust, or mistaken action by the officials of the Revenue Department. To sustain the contention of the Commissioner would amount to the practical nullification of the act in so far as it provides for the right of appeal" (emphasis supplied).

In the present case, however, when the "subordinate officer of the Government, whose decisions the Board is specially vested with power to review" was called upon to respond to a subpoena demanding production of "the evidence, records and data on which the findings of the Commissioner in these tax cases is based," the response of counsel for the subordinate officer was a curt refusal (28a). There was no claim of privilege made.

The Tax Court, without directing production of the material called for by the subpoena, and *without even examining it to determine its relevancy*, declined to enforce the subpoena (R. 29a). This was not only error, as a matter

of law, and Tax Court rules and practice,[10] but a violation of due process of law. It crippled the petitioner's effort to establish that the determination was arbitrary and capricious.

Prior to the actual hearing in the Tax Court, the taxpayer has no coercive methods of investigation or discovery procedures available to him. See *Bowen, Discovery in the Tax Court*, 44 A. B. A. J. 129 (1958). The Commissioner, on the contrary, has a vast and effective investigative apparatus, which enables him to compel testimony under oath not only from the taxpayer and his agents and banks, but any other person he may see fit to interrogate.

As John Potts Barnes wrote in 28 Taxes, the Tax Magazine, 1211, 1212, 1214:

> "The several different kinds of visitorial and investigative powers necessary for effective enforce-

[10] The rule of practice previously followed in the Tax Court, required Judge Raum to draw an unfavorable inference from the Commissioner's refusal to open his files.

As stated in Mertens, *Federal Income Taxation*, Sec. 50.87 (p. 179 of c. 50):

> "if either the Commissioner or the taxpayer fails to comply with a subpoena, the issue of fact that might have been proved through the records will be resolved against the defaulting party."

The Tax Court, in *Pelham G. Wodehouse*, 8 T. C. 637, drew appropriate inferences from the refusal of a Commissioner to obey subpoenas whereby "the petitioners proposed to prove * * * that such records * * * would demonstrate errors in the collector's records for that period".

The Court said (at p. 642 of 8 T.C.):

> "We need not discuss the reason for the refusal of the respondent's agents to testify as directed. We need only cite Blair v. Oesterlein, 275 U. S. 220 and Brewer v. Hassett, 2 FRD 222 to demonstrate that the respondent's position is utterly unwarranted and wholly indefensible. * * * *Therefore the only conclusion justified by this state of facts is that the respondent's files and records would have proved the petitioner's contention*". (Emphasis supplied.)

ment of the tax laws by the Commissioner and his subordinates are found in about half a dozen sections of the Internal Revenue Code * * *.

"The courts, in consonance with the apparent Congressional intent, have held that the powers conferred extend to all persons in addition to the taxpayer himself, who have records or information that may have any bearing upon the determination of the correct tax liability of the person under investigation."

In the present case the petitioners were subjected to a most intensive investigation over a period of four years. The Commissioner's record contained sworn denials by petitioner, and other facts which discredited Crane's story (130a-132a). If the determination made on the basis of that investigation was of an arbitrary or capricious nature the petitioner had a constitutional right to expose it, sufficient foundation having been laid by the production of William O'Dwyer's sworn testimony denying the receipt of the alleged campaign gift, his sworn net worth statement which disproved the receipt of any such gift, and respondent's concession, in open court, that $15,000 of his initial determination was arbitrary and without basis in fact.

The Constitution, and elementary principles of justice and fair play require that those in petitioners' situation be afforded access to the secret evidence in respondent's file, at least before the proceeding is concluded. As was said by Judge Maris for the United States Emergency Court of Appeals in *Victor* v. *Porter*, 157 F. 2d 769, 772:

"The complainants assert that they did not receive a fair hearing because the area rent director did not inform them as to the pertinent data concerning the housing unit upon which he relied as comparable in making his reduction orders and that they were thereby deprived of due process of law. * * * As we recently had occasion to point out in Direct Realty Co. v. Porter, Em. App. 1946, 157 F. 2d 434, while procedural due process definitely requires that a

hearing be accorded at some stage of an administrative proceeding, it does not require that the hearing take place at the initial stage. Accordingly, if the complainants in the ensuing protest proceeding were apprized of the evidence upon which the Administrator relied, and were then given a genuine hearing de novo the demands of due process have been met."

See also:

Fury v. *Fleming*, 161 F. 2d 189, 194;
Pownall v. *United States*, 159 F. 2d 73 (C. A. 9; aff'd 344 U. S. 742).

These principles have even been extended to the process of review of selective service classifications, a procedure not even subject to the provisions of the Administrative Procedure Act. In *Simmons* v. *United States*, 348 U. S. 397, the question involved was whether a selective service registrant who claimed to be a conscientious objector had been accorded a fair hearing by a Department of Justice hearing examiner, to whom the Selective Service Appeals Board had referred the matter for a report as to whether the claim of exemption was justified. At that hearing the petitioner made request for a fair resume of a F.B.I. report that had been transmitted to the hearing examiner. His request had been denied. This Court held that the registrant had been deprived of a genuine hearing.

Mr. Justice Clark said:

"A fair resume is one which will permit the registrant to defend against the adverse evidence—to explain it, rebut it, or otherwise detract from its damaging force—the Congress in providing for a hearing, did not intend for it to be conducted on the level of a game of blindman's buff. The summary was inadequate and the hearings in the Department was therefore lacking in basic fairness" (p. 405 of 348 U. S.).

"This is not an incidental infringement of technical rights. Petitioner has been deprived of the

> fair hearings required by the Act, a fundament safeguard, and he need not specify the precise manner in which he would have used this right and how such use would have aided his cause—in order to complain of the deprivation" (p. 406).

In *Gonzales* v. *United States*, 348 U. S. 407, a similar and related question was presented.

It is significant that the Government conceded in oral argument in the *Gonzales* case that the registrant should have a right to "examine all information in his file" and contended that this remedy was made available by a procedure for asking for a rehearing after the decision of the Appeal Board. This Court said with respect to this:

> "We believe these remedies to be too little and too late. Too little, because the right to present petitioner's side of the cause is more than the right to correct 'errors' made by the Department in its recommendation."

The Court, in *Victor* v. *Porter*, 157 F. 2d 769 (*supra*, p. 22), emphasized two requirements where an administrative decision is made on secret evidence, (1) that complainants be "apprised of the evidence upon which the Administrator relied"; and (2) that the complainants be given a "hearing de novo". The Court below, however, thought that it was enough to give only the latter, but not the former, as long as the Tax Court's decision was not itself based on secret evidence (p. 43, *infra*). But when a decision is based entirely, or in any measure, on the "presumption of correctness" engirdling an administrative determination, which was in turn based on secret evidence, the taxpayer is denied a fair hearing.

The Court below declares, without the slightest basis for saying so, that "the determination of the Commissioner * * * [was] based upon substantially the same evidence presented before the Tax Court" (*infra*, p. 48).

How does the court know this? Not from evidence or any finding of fact.

The court below in rejecting the petitioner's appeal, uses the shopworn phrase "fishing expedition" and suggests an intention to "raid Government confidential files for some purpose, as yet not clearly disclosed". Not at all! The failure of the respondent to call Finkelstein, and the sharp conflict between the early and later Crane version, and its embellishment by Wilders, all contribute to a showing of the probable existence, in the respondent's file, of evidence of the arbitrary or capricious nature of his determination.

The probable existence of Revenue Agents' reports in this case contrary to the respondents' ultimate determination is more than suggested by the evidence that Mayor O'Dwyer's sworn and public denials of Crane's story were made and specifically given to the Commissioner's agents in March of 1951; no action was taken against him for about three years thereafter; and it was only some time after a change in administration occurred, that the adverse determination was made by the Commissioner.

The weight of such evidence as an opinion by a Revenue Agent or other subordinate of the Commissioner, contrary to the Commissioner's own, has been sharply upgraded by the decision of this Court in *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474. The Court there held that a Court of Appeals, in reviewing a Labor Board decision, must give substantial weight to a report of a trial examiner, who had himself been reversed by the Labor Board, saying:

> "Surely an examiner's report is as much a part of the record as the complaint or testimony" (p. 493) and "evidence supporting a conclusion may be less substantial when an impartial experienced examiner who has observed the witnesses and lived with

> the case he has drawn conclusions different from the Board's" (p. 496).

A taxpayer faced with the injurious handicap that there is a "presumption of correctness" shielding an administrative determination that he seeks to reverse, is entitled to ventilate the basis of that determination. As was said in *Greene* v. *McElroy*, June 29, 1959, 27 LW 4528, 4534:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue."

Effect of the Administrative Procedure Act

Section 10(e) of the Administrative Procedure Act expresses a statutory command which requires respondent, in a proper case, to show the Tax Court such information as he may have in his file as is adverse or inconsistent with the determination sought to be reviewed.

Section 10(e) requires a "reviewing court" to review "the whole record" in determining whether "agency action" is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law".

That section has been authoritatively described (e.g. Attorney General's Manual on the Administrative Procedure Act, p. 93) as a "general restatement of the principles of judicial review embodied in many statutes and judicial decisions" (see also Sen. Doc. 248, 79 Cong. 2d Sess. pp. 83-84; 224, 229, 406-407).

The Tax Court was "created by Congress in 1924 to provide an 'independent review' of" the administrative decisions of the Commissioner of Internal Revenue. See

Note, 1957, 57 *Col. Law Rev.* 717; *Old Colony Trust Co.* v. *C.I.R.*, 279 U. S. 716, 721.

As stated in *Williamsport Wire Rope Co.* v. *U. S.*, 277 U. S. 551, 564, the "sole function" of the Tax Court "consists in reviewing on appeal, determinations of the Commissioner under the Revenue laws."

The distinction between the Commissioner's administrative process of investigation, and initial determination, and the judicial process of review by the Tax Court was well stated by John Potts Barnes in "Inquisitorial Powers of the Federal Government Relating to Taxes", 28 Taxes, The Tax Magazine, p. 1211.

That the Commissioner of Internal Revenue is an "agency" or "administrative agency" within the meaning of the Act is not open to doubt. As Mr. Barnes wrote "the Commissioner alone * * * is empowered to do those things * * * which are the very essence of the administrative process". In the debate on the act in the House on May 24, 1946, the Congressman Walter, a co-draftsman of the Act, made specific reference to the "Bureau of Internal Revenue" as an agency contemplated to be covered.

Unless there be some basis for the Commissioner's claim that the Tax Court is not a "reviewing Court" within the meaning of Section 10(e), an order directing compliance with the subpoena, as the only procedural device calculated to bring up the "whole record", was petitioners' right as a matter of course.

The Court below boldly declared that Tax Court "review" is exempt from the "whole record" requirement of Sec. 10(e), thereby ignoring the rule of *Brownell* v. *Tom Wu Shung*, 352 U. S. 180, 185:

> "'Exemptions from the Administrative Procedure Act are not lightly to be presumed' Marcello v.

> Bonds, 349 U. S. 302, 350, and unless made by clear language of supersedure the expanded mode of review granted by that Act cannot be modified."

The legislative history of the Administrative Procedure Act shows that it was expressly contemplated that the Tax Court's review of the Commissioner's administrative determination was covered by Section 10 of that Act.

The report of the Senate Judiciary Committee (Sen. Rep. 752, 79 Cong. 1st Sess.) contains a detailed analysis of the Act and is reprinted at pages 185-231 of Sen. Doc. 248, 79th Cong. 2d Sess., the Legislative History of the Administrative Procedure Act. At page 214 of this Senate Document, the Committee submits its analysis of Section 10 ("Judicial Review") subsection e ("Scope of Review"). Referring to the six alternative categories of review, the Committee submits as one example of the type of review referred to:

> "Thus, where adjudications such as tax assessments are not made upon an administrative hearing and record, contests may involve a trial of the facts in the Tax Court or the United States District Court." [11]

The duty of the "reviewing court" to look at the "whole record" when asked to set aside agency action as "arbitrary" or "capricious" is set forth in the last sentence of Section 10(e) in the phrase: "The court shall review the whole record" in making the "foregoing determinations" i.e., the determination whether the action complained of is arbitrary or capricious, contrary to constitutional right, in excess of statutory jurisdiction, etc.

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[11] In almost identical language, at page 279 of Sen. Doc. 248, the House Report on the Administrative Procedure Act (H. Rep. 1980, 79th Cong., 2d Sess.) declares it to be the intention of the legislators that the Tax Court's review of the Commissioner's assessment is intended to be embraced within the types of judicial review to be governed by the standards set forth in Section 10(e) (5 U. S. C. Sec. 1009(e)).

That the Tax Court is a "court" within the meaning of the Administrative Procedure Act (regardless of how it may have been characterized for other purposes, or other occasions) is established by the "Attorney General's Manual on the Administrative Procedure Act" issued by Attorney General (now Mr. Justice) Clark in August, 1947. At page 10 of that report it is stated:

> "The term 'courts' is not limited to constitutional courts, but includes the Tax Court, the Court of Customs and Patent Appeals, the Court of Claims, and similar courts. Sen. Rep. p. 38 (Sen. Doc. p. 408)."

The Court of Appeals, however, in the face of the plain intention of Congress to make review of all administrative proceedings subject to Section 10 of the APA (except as explicitly provided for therein) holds that Section 10(e), in referring to the "whole record", is limited to formal agency action specified in Section 5, 7 and 8 of the Act. (*infra*, p. 40) Its reasoning, however, is a pure non-sequitur, for it suggests that otherwise the Commissioner's investigation is subject, procedurally, to the requirements of Section 5, 7 and 8. The one issue has nothing to do with the other. In fact, in Section 10(e) Congress made specific reference to the type of Administrative action subject to trial *de novo*—meaning precisely the action exempted from 5, 7 and 8. (See Sen. Doc. 248, 79 Cong. 2nd Sess. p. 214.)

Section 10 deals with Judicial Review of administrative decisions, whether made after formal hearing or otherwise. The opinion below obscures the applicability of Section 10 to *all* review of Agency action. In the absence of an express exemption in the statute, the Tax Court is a "reviewing Court" within the meaning of Section 10; review by it of the Commissioner's decision is required to be conducted in accordance with the standards set forth in Section 10; and thus production of the "whole record" before the agency is required when it is asserted, with probable cause, that there has been arbitrary or capricious action by the agency.

3.

The non-personal expenditures concededly made by petitioner as Ambassador to Mexico were deductible as business expenses.

Manifested throughout the examination of the petitioners' 1949, 1950 and 1951 returns was a determination to saddle them with tax liabilities regardless of the law or the facts. As evidence of this statement we need only refer to the original notices of deficiency for 1950 and 1951 which included as alleged unreported income sums of $5,541.02 in 1950 and $14,156.48 in 1951 which were finally admitted to have been wholly erroneous. Such an error is not merely excessive zeal to protect the revenue; it is capricious and the exercise of administrative power for an arbitrary purpose.

The petitioners placed in evidence their original records and accountant's work papers showing the method used to determine deductions for unreimbursed expenditures made as Ambassador to Mexico (Ex. 1a). The Commissioner had disallowed the entire deduction of $6,135.94 claimed by petitioners for 1950 and $10,000 of the $12,266.26 claimed for 1951.

Upon examining the exhibits, the Tax Court overruled these determinations and allowed deductions of $1,957.41 for 1950 (as against Commissioner's allowance of *none*) and of $7,875.50 for 1951 (as against the Commissioner's allowance of $2,266.26).

The Commissioner deliberately shut his eyes to what is common knowledge: that the duties of an Ambassador require unusual and heavy expenditures, beyond his allowance, in carrying out his official functions; and that the Government has almost always failed to prove sufficient funds to defray the actual expenses of any of its Ambassadors.

Petitioner's accountant did, in fact allocate a reasonable portion of the total expenses for his personal purposes but the Commissioner failed to take even such allocation into consideration and arbitrarily disregarded the actualities.

The varying positions taken by (1) the Commissioner, in his initial determination; (2) his counsel, on brief, in the Tax Court, in conceding error and (3) Judge Raum in finding additional error, all go to accentuate one proposition: that the opposition to the deductions claimed is based on speculation and conjecture.

It is submitted that the Commissioner's assumption that the Internal Revenue Code either gives him the power to veto an expenditure by an American Ambassador or to hold such Ambassador to a stricter segregation of public and private functions than would be the situation of an ordinary salesman, is, indeed an arrogation of power not justified in the law or reasonable in practice.

The inadequacy of the statutory representation allowance to American Ambassadors is so well known that the Court can perhaps take judicial notice of the fact. It is a truism that acceptance of a post as Ambassador involves a tremendous personal sacrifice for the individual accepting the responsibility. It is a measure of the discriminatory and arbitrary action taken by the Commissioner that this is the first recorded instance of disallowance of unreimbursed expense deductions claimed by an American Ambassador.

We submit, as an expert witness, our late Secretary of State testifying before the United States Senate Subcommittee on Appropriations on April 26, 1955:

> "I note that the House has also reduced our requests for operational allowances from $700,000 to $475,000. In terms of our general budget these savings are slight. Yet the loss of the $225,000 can have a far-

reaching effect upon the very character of our Foreign Service. Representation is an essential part of the conduct of our foreign relations. Do we want a Foreign Service, the most important posts of which can be held only by men of private means, whether or not they are best suited for the job? Or, do we desire a Foreign Service in which the best can serve regardless of their private financial position? If we are to have a truly democratic Foreign Service, we must be prepared to provide our officers with adequate operational allowances in order to enable them to do the amount of entertaining which their position demands of them as well as to enlarge in other activities of a representational character. Our key officers cannot, on their present salaries, engage in activities necessary for the maintenance of friendly contact and for the successful carrying out of their work."

In addition, in his testimony at page 145, Secretary Dulles stated:

"The so-called operational allowance was cut $225,000 and the representation allowance is quite inadequate under present circumstances. It is almost insignificant as to what is paid in that respect by the British Government, for example. I have visited many of these embassies and consulates abroad. I have been to 32 countries since I have been Secretary of State, something which no other Secretary has even approximated, and I find that the burdens that are thrown upon our people for entertaining are excessive and are creating situations where more and more it is impossible to get people to take these positions unless they have independent means. That is, of course, a problem with which we have always been faced with the bigger embassies, such as at London and Paris."

4.

The Commissioner's determination that a mere isolated bank deposit of $1,500 constituted income was erroneous and should have been set aside.

The statutory notice increased the 1951 income of the petitioners by the amount of $15,656.48, which the Commissioner claimed was additional income unreported for the year. At the hearing, the Commissioner admitted that the statutory notice was completely in error, except that he continued to insist on a claim of omission of income of an item of $1,500.

The evidence with respect to this item showed that on July 16, 1951 a deposit of $1,500 had been made in a joint bank account maintained by Mrs. O'Dwyer and her mother. The Commissioner did not offer to prove any facts or circumstances claimed to justify his finding that such deposit constituted income.

As Judge Parker said in *Sandford & Brooks*, 35 F. 2d 313, "Income * * * is not synonymous with receipts".

This Court has recently said, in *Holland* v. *United States*, 348 U. S. 121, 137-138:

> "Increases in net worth, standing alone, cannot be assumed to be attributable to currently taxable income".

Or, as stated by the Court of Appeals in *Hague's Estate* v. *C.I.R.*, 132 F. 2d 775, 776 (C. D. 318 U. S. 787):

> "It is true, as has been argued by petitioners, that proof that bank deposits were made, is not enough to show the receipt of income and, a fortiori, of taxable income. * * *"

The Commissioner, with his array of vast inquisitorial powers, could discover no actual omission, no likely source

of income, no indicia of any kind of concealed income. He nevertheless seized upon this deposit as income.

However a deposit in a joint account could not in any case be presumed to be the income of one. The evidence, before the Tax Court, of joint ownership of the account placed on the Commissioner a burden he did not meet—to establish the identity of the owner and the nature of the joint deposit. The presumption of correctness cannot be relied on when an absence of *any* evidence to support a determination is demonstrated.

CONCLUSION

For the foregoing reasons it is respectfully prayed that the petition for a writ of certiorari be granted.

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